

**LETTER OPINION**  
**99-L-48**

May 25, 1999

Mr. Peter Welte  
Steele County State's Attorney  
PO Box 355  
Finley, ND 58230

Dear Mr. Welte:

Thank you for your letter asking whether the Steele County Board of County Commissioners (Commission) complied with the requirements of N.D.C.C. ch. 11-10.2 when it redesignated the offices of county state's attorney and county register of deeds as appointive rather than elective and combined the elective offices of county auditor and county treasurer.

N.D.C.C. ch. 11-10.2 was enacted as part of the "Tool Chest" bill in 1993. 1993 N.D. Sess. Laws ch. 401, § 3. It authorizes counties to combine two or more elective county offices or redesignate an elective county office as an appointive office without having to adopt a home rule charter. N.D.C.C. § 11-10.2-01. Such a combination or redesignation may be accomplished:

By resolution of the board of county commissioners, subject to the right of referendum in the county electors. The board of county commissioners may by a majority vote adopt a preliminary resolution incorporating a proposed plan for combining or separating county offices, or redesignating a county office as elective or appointive. The board shall cause the complete text of the proposed plan to be published in the official newspaper of the county, at least once during two different weeks within the thirty-day period immediately following the adoption of the preliminary resolution. . . . Within two years after the adoption of the preliminary resolution, the board of county commissioners may by final resolution approve the plan or amend the plan and approve it for implementation according to its terms.

N.D.C.C. § 11-10.2-02(1).

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A plan for combining or redesignating elective county offices under N.D.C.C. § 11-10.2-02 "must be based on an analysis of each affected office . . . ." N.D.C.C. § 11-10.2-03. After the plan is approved, a copy of the plan must be filed with both the district court for the county and with the county auditor "as a part of the county's permanent records." N.D.C.C. § 11-10.2-04.

In the situation you present, questions arise regarding both the process used to approve the plan and the substance of the plan approved by the Commission.

First, N.D.C.C. § 11-10.2-02(1) requires that the plan be published at least once in two separate weeks within thirty days of the Commission's approval of a preliminary resolution, which in this case was on January 5, 1998. We have reviewed the four editions of the Steele County Press which were published within thirty days after January 5, 1998 (January 9, January 16, January 23, and January 30). The plan was published on January 9, 1998, as a public notice. The plan was published again on January 16, 1998, as part of the minutes of the Commission's meeting on January 5, 1998. Thus, the text of the plan was published twice in the county newspaper, although perhaps it should have been published separately both times. It is my opinion that any error in not publishing the plan separately for a second time is legally insignificant in light of the numerous newspaper articles on the same topic in the county newspaper.

Second, you indicated in a phone call to this office that the plan approved by the Commission has not been filed with the district court for the county as required in N.D.C.C. § 11-10.2-04.<sup>1</sup> The apparent purpose of the requirement of making the plan "a part of the county's permanent records" under that section is to make the specific provisions of the plan available to the public in the event a challenge is raised to the Commission's decision under N.D.C.C. § 11-10.2-02. In a similar situation involving a petition presented to a county redistricting board but not approved until after the statutory period expired for consideration of the petition, this office quoted a prior opinion concluding:

[I]t cannot logically be contended that [the] failure to perform a purely ministerial duty within a certain period of time can affect the validity of a sufficient petition

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<sup>1</sup> The plan was filed with the county auditor since it was included in the official minutes of the Commission's meeting on January 5, 1998.

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for the redistricting of the county or the jurisdiction of the redistricting board to act thereon.

1946-48 N.D. Op. Att'y Gen. 73 (quotation omitted). You have indicated to this office that your letter is not motivated by any challenge presented to the Commission's decision, but rather as a result of internal review of the process used by the county under N.D.C.C. ch. 11-10.2. Because no one has attempted to object to the plan and been prejudiced by the failure to file the plan with the court, and because the plan need not be filed until an unspecified date after the plan has been approved, it is my opinion that the failure to fully comply with the ministerial requirements of N.D.C.C. § 11-10.2-04 does not affect the validity of the Commission's approval of the plan.

The major legal concern presented in this situation is the brevity of the plan approved by the Commission. In its entirety, the plan for redesignating the office of state's attorney as appointive rather than elective states:

The Steele County Board of Commissioners has resolved to consider the redesignation of the currently elective office of Steele County States Attorney to an appointive office, to broaden the county's option in fulfilling the county's responsibilities in this area. The dramatically decreasing availability of licensed, practicing attorneys residing in Steele County, and the requirement that elected officials must reside in the county, prompts the commission to consider this option. The Steele County Board of Commissioners propose to consider candidates for appointment during the fall of 1998, and intend to appoint a qualified candidate to fill the position effective January 1, 1999. This appointment would begin upon the expiration to the current office[] holder's term which runs through December 31, 199[8] or before at the request of the current office holder. The necessary functions of this office would still be performed but the hours of duty, fees for services and length of the term in office of the appointed Steele County States Attorney are to be negotiated and agreed to between the successful candidate and the Steele County Board of Commissioners prior to the attorney assuming the position.

The plan proposed for redesignating the office of register of deeds as appointive and for combining the elective offices of county auditor and county treasurer are similarly brief.

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N.D.C.C. ch. 11-10.2 does not specify the amount of information required to be included in the plan. The plan must be in writing or else it could not be filed under N.D.C.C. § 11-10.2-04. A plan "may include" several provisions listed in N.D.C.C. § 11-10.2-03(3), but those provisions are merely suggestions and are not required. The only specific requirement for a plan under N.D.C.C. § 11-10.2-03 is that the plan be based on an analysis of each affected office, which may be performed as part of a study process initiated pursuant to N.D.C.C. ch. 40-01.1.

The minutes published in the January 16, 1998, edition of the county newspaper show that Steele County utilized the study process authorized under N.D.C.C. ch. 40-01.1. The Steele County Advisory Study Committee met with the Commission on December 19, 1997, and made ten recommendations to the Commission, three of which pertained to combining or redesignating the elective offices discussed in this opinion. These recommendations were implemented by the Commission at its meeting on January 5, 1998.

Almost a year and a half have passed since the Commission approved the plan for combining and redesignating certain elective county offices and nearly six months have passed since you took office as county state's attorney in December 1998. I am reluctant to conclude that the plan is insufficient given the time that has passed and the fact that the plan has already been implemented, at least in part, without objection.

Considering the lack of any specific requirements for the contents of a plan approved under N.D.C.C. § 11-10.2-02, the lack of any objection to the plan despite thorough coverage of the decision in the local newspaper, and the length of time that has passed since the plan was approved, it is my opinion that the plan approved by the Commission is sufficient. Accordingly, it is my further opinion that the Commission's action substantially complied with N.D.C.C. ch. 11-10.2.

Sincerely,

Heidi Heitkamp  
Attorney General

jcf/vkk